In the Supreme Court
OF THE
United States

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CHARLES ELMORE CROPLEY
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OCTOBER TERM, 1944

No. 783

LOUIS FLEISH,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Louis Fleish, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

STATEMENT OF MATTER INVOLVED.

Petitioner was charged, by an indictment (R. 5-8) filed on June 2, 1938 in the District Court of the United States for the Eastern District of Michigan, Southern Division, hereinafter called "Trial Court", with violations of 26 U.S.C.A. 1132d and 1132e (1934 Edition), set forth verbatim in the Appendix, being portions of the National Firearms Act. Count 1 (R. 5) of the indictment, based upon 26 U.S.C.A. 1132e, charged that petitioner, at a certain time and place, received and possessed a firearm upon which the transfer tax had not been paid. Count 3 (R. 6), based upon 26 U.S.C.A. 1132d, charged that petitioner, at the same time and place, possessed the same firearm without registering it. Counts 12, 15, 18 and 21 (R. 6-8), also based upon 26 U.S.C.A. 1132d, were identical with Count 3, except that a different firearm was described in each. Upon a verdict of guilty upon the aforesaid six Counts, petitioner was sentenced on April 7, 1939 (R. 2) to be imprisoned for a term of five years upon each of said Counts, said terms to run consecutively, and to pay a fine of $2000.00 (R. 3).

Upon June 24, 1943, petitioner filed with the District Court of the United States for the Northern District of California, Southern Division, his verified petition for a writ of habeas corpus (R. 2-3), pursuant to the provisions of 28 U.S.C.A. 451 (conferring powers on the Federal District Courts to issue writs of habeas corpus) and of 28 U.S.C.A. 452 (conferring powers on the several judges of the said District Courts to grant said writs for the purpose of inquiring into the cause of restraint of liberty), alleging that he was unlawfully restrained of his liberty by

imprisonment in the United States Penitentiary at Alcatraz Island, California, under the custody of respondent. The said petition further alleged that the said restraint was illegal for the reason that it was contrary to that portion of the Fifth Amendment to the Constitution of the United States which provided that no person should be subject to be twice put in jeopardy for the same offense, in that Counts 1, 3, 12, 15, 18 and 21 purported to charge separate offenses and in that the said Trial Court rendered separate, consecutive sentences thereon, whereas said counts, as a matter of law, charged but one offense; that the maximum penalty which the said Trial Court lawfully could have imposed for the single offense was imprisonment for a single term of five years and a fine of $2000.00; that the sentence of imprisonment was void to the extent that it exceeded the term of five years (Counts 3, 12, 15, 18 and 21) and that petitioner had served the authorized portion of his sentence of imprisonment (Count 1). The said petition was based upon the general principle that relief may be had by habeas corpus when the sentence imposes imprisonment for a longer term than that authorized by law and petitioner has served the authorized part (*Harlan v. McGourin,* 218 U.S. 442, 54 L. Ed. 1101; *Bertsch v. Snook,* 36 F. (2d) 155).

Petitioner applied to the United States Commissioner in San Francisco, California, on July 16, 1943, to discharge his liability for the payment of said fine, in accordance with the provisions of 18 U.S.C.A. 641 (R. 3). The said application was denied on July 21, 1943 (R. 3).

Thereafter, the said petition for a writ of habeas corpus was, on return to order to show cause, heard by and argued before the said District Court and was, on September 21, 1943, denied by the said District Court (R. 4 and 8).

Petitioner, on December 20, 1943, invoked the appellate jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit, hereinafter called "Appellate Court", by the timely filing of his notice of appeal (R. 8), under the procedure established by Rule 73 of the Federal Rules of Civil Procedure and rendered applicable to appeals in habeas corpus proceedings by Rule 81 of said Rules. The Appellate Court had jurisdiction of the said appeal under the provisions of 28 U.S.C.A. 463 (providing that, in a proceeding in habeas corpus in a Federal District Court, the final order should be subject to review on appeal by the Circuit Court of Appeals of the circuit wherein the proceedings were had). Upon September 29, 1944, the Appellate Court rendered its decree (R. 16) affirming the order of the said District Court, and the said decree was entered on the same day. The opinion of the Appellate Court is reported in 145 F. (2d) 16, and is also printed in full in the record (R. 13-16).

JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under the provisions of Section 240(a), as amended, of the Judicial Code (28 U.S.C.A. 347(a)).

The decree of the Appellate Court was entered on September 29, 1944 (R. 16), and this petition for a

writ of certiorari to review same is filed within the three months' period permitted by 28 U.S.C.A. 350 and Rule 38 of this Court.

QUESTIONS PRESENTED.

I. Did the Appellate Court, in its construction of 26 U.S.C.A. 1132d and 1132e, err in holding, as a matter of law, that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 of the indictment after it had sentenced him upon Count 1 thereof?

II. Did the Appellate Court err in finding (by inference), as a matter of fact, that the petitioner had not served his sentence under Count 1 of the indictment?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The decision of the Appellate Court, in holding that the possession of five different firearms (Counts 3, 12, 15, 18 and 21) at the same time and place constituted five separate offenses (and permitting the imposition of a sentence of imprisonment of twenty-five years),

1. Is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Braden v. United States,* 270 F. 441 (1920), where the possession of four different drugs at the same time and place was held to be one offense only;

2. Is in conflict with its own decisions in the case of *Parmagini v. United States,* 42 F. (2d) 721 (1930), where the concealing of two different

drugs at the same time and place was held to be one offense, and in the case of *Johnston v. Lagomarsino,* 88 F. (2d) 86 (1937), where the taking of three different parcels of mail matter at the same time and place was held to be but a single offense;

3. Is in conflict with the recent decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Robinson v. United States,* 143 F. (2d) 276 (1944), where the transportation of three different women at the same time and place was held to constitute only one offense;

4. Involves an important question of federal law which has not been, but should be, settled by this Court. From 1934 to 1939, the National Firearms Act (26 U.S.C.A. 1132-1132q, 1934 Edition) constituted the federal law governing the use of firearms in the United States; in 1939, substantially all of the provisions of the said Act were carried forward into the Internal Revenue Code (26 U.S.C.A. 2700-2733, 1940 Edition), and this Code today contains the controlling federal statutes on the subject. The only two instances in which this Court has passed upon this federal legislation, in the ten years of the latter's existence, dealt with the question of constitutionality (*Sonzinsky v. United States,* 300 U.S. 506, 81 L. Ed. 772, 1937; *United States v. Miller,* 307 U.S. 174, 83 L. Ed. 207, 1939). This Court has never determined, under 26 U.S.C.A. 1132d (Counts 3, 12, 15, 18 and 21), whether or not an individual possessing, at the same time and place, a hundred firearms which had not been registered could be

sentenced to imprisonment for an aggregate term of five hundred years. This is a matter which will become of increasing importance in post-war years, at a time when countless firearms in the United States will be possessed by individuals returning from combat and by other law-abiding citizens ignorant of the minute requirements of federal law. In the public interests of fairness to such persons and of minimizing criminal litigation, this Court should settle, for the first and last time, the question herein raised.

The decision of the Appellate Court, in holding that the receipt and possession of a firearm which had been transferred without payment of tax (Count 1) and the possession of the same firearm at the same time and place without registration (Count 3) constituted two separate offenses,

1. Is the decision of a federal question in a way probably in conflict with applicable decisions of this Court. In *Burton v. United States,* 202 U.S. 344, 50 L. Ed. 1057 (1906), in *Gavieres v. United States,* 220 U.S. 338, 55 L. Ed. 489 (1911), and in *Morgan v. Devine,* 237 U.S. 632, 59 L. Ed. 1153 (1915), this Court relied upon the "same-evidence" test in determining the identity of offenses, which said test in substance provides that, if the same evidence will sustain a conviction on each count, the counts allege but one offense; the Appellate Court failed to apply this test. In *Rossi v. United States,* 289 U.S. 89, 77 L. Ed. 1051, the principle was laid down that negative averments need not be proved; the Appellate Court failed to apply this principle. It was only neces-

sary for the prosecution in the instant case to prove petitioner's receipt and possession of the single firearm in order to convict him upon Counts 1 and 3; therefore, the same evidence which was required to prove Count 1 also proved Count 3; under such circumstances, there was only one offense;

2. Is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Crapo v. United States,* 100 F. (2d) 996 (1939), where it was held that, in order to convict for the possesion of a firearm which had been transferred without a written order, the prosecution need prove only the possession, on the ground that a negative averment did not require proof; if this is so, petitioner could have been convicted upon both Counts 1 and 3 upon proof of the receipt and possession of the single firearm, and therefore there was only one offense (*Burton v. United States,* supra; *Gavieres v. United States,* supra; *Morgan v. Devine,* supra);

3. Is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Lewis v. United States,* 4 F. (2d) 520 (1925), where it was held that the possession of liquor with intent to sell it without a permit and the possession of the same liquor at the same time and place with intent to transport it without a permit constituted only one offense;

4. Is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Roark v. United States,* 17 F. (2d) 570 (1927), where it was held that the causing of a

woman to be transported for the purpose of having illicit intercourse and the causing, at the same time, of the same woman to be transported for the purpose of prostitution constituted a single offense;

5. Is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Caballero v. Hudspeth,* 114 F. (2d) 545 (1940), where it was held that the transportation of a woman with intent to compel her to engage in prostitution and, at the same time and place, the transportation of the same woman with intent to cohabit unlawfully with her were one offense;

6. Is in conflict with its own decision in the case of *Dimenza v. Johnston,* 130 F. (2d) 465 (1942), where it was held that the robbing of a bank, during the course of which the lives of three different persons were jeopardized, was but a single offense;

7. Involves an important question of federal law which has not been, but should be, settled by this Court. Reference has heretofore been made to the nature of the statute and the increasing importance in post-war years of its clarification. This Court has never determined, under 26 U.S.C.A. 1132e (Counts 1 and 3), whether or not an individual in possession of a single firearm could be sentenced to imprisonment for an aggregate term of twenty years because the one possession was illegal by reason of an earlier transfer with reference to which (a) the transfer tax had not been paid (26 U.S.C.A. 1132b(a)), (b) the stamps had not been affixed to the order for the firearm

(26 U.S.C.A. 1132b(a), (c) no written order from the transferee had been obtained (26 U.S.C.A. 1132c(a)), and the stamp-affixed order had not been transferred (26 U.S.C.A. 1132c(d)).

PRAYER FOR WRIT.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 10,672, Louis Fleish, Appellant, vs. James A. Johnston, Warden, United States Penitentiary, Alcatraz Island, California, Respondent, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of the said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated, San Francisco, California,
December 20, 1944.

LOUIS S. BEEDY,
Attorney for Petitioner.

JOHN BENNETT KING,
Of Counsel.

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No.

LOUIS FLEISH,
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vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, hereinafter called "Appellate Court", is reported in 145 F. (2d) 16, and is also printed in full in the record (R. 13-16).

JURISDICTIONAL STATEMENT.

Petitioner hereby refers to and incorporates herein the "Jurisdictional Statement" and the "Reasons Relied Upon for Allowance of Writ", as same appear in the foregoing petition.

STATEMENT OF MATTER INVOLVED.

In the foregoing petition for writ of certiorari, petitioner has set forth all that is material to the consideration of the questions presented, and he hereby refers to, adopts and makes same a part of this brief.

SPECIFICATION OF ERRORS.

Petitioner believes that the Appellate Court erred in the following particulars:

1. In its construction of 26 U.S.C.A. 1132d and 1132e, the said Court erred in holding that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 of the indictment after it had sentenced him upon Count 1 thereof;

2. The said Court erred in finding (by inference) that petitioner had not served his sentence under Count 1 of the indictment.

ARGUMENT.

Summary: Petitioner contends that he committed but one punishable offense, the maximum penalty for which was five years' imprisonment and a $2000.00 fine (26 U.S.C.A. 1132m, printed verbatim in the Appendix), and that he has served the only sentence of imprisonment which lawfully could have been imposed for one punishable offense. The theory upon which this contention is based will be developed in two phases (but only to the extent required to support the reasons relied on for the allowance of the writ of certiorari, a more comprehensive development of the merits being reserved until such time as this Court shall see fit to grant the foregoing petition therefor): first, the offenses charged in Counts *3*, 12, 15, 18 and 21 constituted one indivisible offense; second, the offenses charged in Counts 1 and *3* constituted one indivisible offense.

---

1. THE OFFENSES CHARGED IN COUNTS 3, 12, 15, 18 AND 21 CONSTITUTED ONE INDIVISIBLE OFFENSE.

It will be recalled that County 3 (R. 6) alleged that petitioner, at a certain time and place, possessed a firearm without registering it; that Counts 12, 15, 18 and 21 (R. 6-8) alleged that petitioner, at the same time and place, possessed four other firearms without registering them. All counts were based upon 26 U.S.C.A. 1132d (printed in Appendix). The Trial Court sentenced petitioner to imprisonment for a term of twenty-five years for this single and simultaneous possession of five different firearms which had not been registered (R. 3).

In the case of *Braden v. United States,* 270 F. 441 (C.C.A. 8th, 1920), the statute forbade the possession of "any of the aforesaid drugs". Defendant was sentenced separately on four counts, each of which alleged his possession, at the same time and place, of a different type of drug. The court held that the sentences on three of the counts were invalid, stating that, although the government contended that the words "any of the aforesaid drugs" permitted it to base a count upon each drug possessed,

> "We do not think that any such significance can be given to the word 'any'. The use of this word simply means that, if the defendant under the required circumstances should be found in possession of any of said drugs, he would be guilty. If a person steals four horses from the barn of another, all being of different color, it would not be competent to charge the thief with four different larcenies when the horses were all taken at the same time and place. Another illustration would be the larceny of articles of merchandise from a store. If twelve articles were all taken at the same time and place, we do not think it would be competent to charge the thief with twelve different larcenies."

This decision has been cited twenty-four times since its rendition; it has never been modified, reversed, limited, or expressly overruled; it was approved in *Roark v. United States,* 17 F. (2d) 570 (C.C.A. 8th, 1927), in *Parmagini v. United States,* 42 F. (2d) 721 (C.C.A. 9th, 1930), in *Ex parte Lagomarsino,* 13 Fed. Supp. 947 (D.C., Calif., 1936), and in *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937).

In *Parmagini v. United States,* 42 F. (2d) 721 (C.C.A. 9th, 1930), the statute forbade the concealing of "any such narcotic drug". Defendant was sentenced to pay separate fines on two counts, each of which charged that he concealed a different drug at the same time and place. The court (which is also the Appellate Court in this case) held that a fine should have been imposed on one of the counts only, for the reason that there was but one offense involved:

> "Where opium and morphine were concealed in a single package, only one offense is committed by such concealment regardless of the fact that more than one narcotic drug is contained in the package. Braden v. U.S. * * * It follows that the punishment for concealing morphine and opium in this case were for the same offense * * *."

This decision has been cited in eleven instances. It has never been modified or reversed, limited or expressly overruled. It has been approved in *Ex parte Lagomarsino,* 13 Fed. Supp. 947 (D.C., Calif., 1936).

In *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937), the statute forbade the taking of "any letter, postal card, package, bag or mail". Defendant was sentenced separately on three counts, each of which charged the taking of a different parcel of mail matter (presumably at the same time and place). The court (which again is the Appellate Court) held that sentences on two of the counts were invalid:

> "While every presumption must be indulged in favor of the judgment and sentence, * * * but where upon the face of the record it is disclosed that the offense charged involved several separate

> articles, not charged as separately taken, but which may have been simultaneously and continuously taken, a different relation obtains. Suppose a flock of sheep is stolen as one act. May the thief be punished for stealing each sheep simultaneously and continuously driven away? * * * To take several letters from a mail depositary simultaneously and continuously is one act and comprehends one intent."

This decision has not been modified or reversed, criticized, limited, expressly overruled, or questioned. It was approved and followed in *Colson v. Johnston,* 35 Fed. Supp. 317 (D.C., Calif., 1940).

In *Robinson v. United States,* 143 F. (2d) 276 (C.C.A. 10th, 1944), the statute forbade the transportation in interstate commerce of "any woman * * * for the purpose of prostitution". Defendant was sentenced separately on (a) counts 2 and 3, and (b) count 4, each count having charged that he transported in interstate commerce, at the same time and place, a different woman for the purpose of prostitution. The court remanded the case to the trial court with instructions to resentence defendant on the basis of a single offense:

> "Unlawful transportation is the gist of the offense. * * * Here, the transportation was a single, continuous act and the offense was completed when the transportation crossed the state line. As to each woman the offense commenced and ended simultaneously. * * * If a person drove a vehicle to the barn of another and * * * loaded into the vehicle 25 sacks of corn, * * * and carried it away with the intent permanently to deprive the

> owner of the possession thereof, such person would be guilty of a single larceny, although he loaded each sack into the vehicle separately and had an unlawful intent as to each sack of corn."

The Appellate Court made absolutely no allusion in its opinion (R. 13-16) to any one of the four authorities cited above (*Braden v. United States, Parmagini v. United States, Johnston v. Lagomarsino, Robinson v. United States*). Instead, the said court chose to rely upon two decisions, *Ebeling v. Morgan,* 237 U.S. 625, 59 L.Ed. 1151 (1915) and *McKee v. Johnston,* 109 F. (2d) 273 (C.C.A. 9th, 1939), neither of which was in point.

Thus, in *Ebeling v. Morgan,* supra, this Court held that the *successive* cuttings of several mail bags constituted several separate offenses. Petitioner does not contest the correctness of such decision: where forbidden acts are not done *at the same time,* the principles which he urges have no application. In petitioner's case, the possessions of the firearms were simultaneous.

Again, in *McKee v. Johnston,* supra, there were *successive* takings from different mail bags, and it was properly held that each taking constituted a separate offense. The Court was careful to distinguish the case from *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937), where it was held to be but one offense to take several letters from a mail depositary *simultaneously.*

2. THE OFFENSES CHARGED IN COUNTS 1 AND 3 CONSTITUTED ONE INDIVISIBLE OFFENSE.

Assuming that Counts 3, 12, 15, 18 and 21 are held to constitute one indivisible offense, the latter four of them shall be deemed to have been merged into Count 3 for purposes of punishment, and this supporting brief will proceed upon the theory that the only remaining counts to be dealt with are Counts 1 and 3.

It will be recalled that Count 1 (R. 5) charged that petitioner, at a certain time and place, received and possessed a firearm which had been transferred without payment of tax (26 U.S.C.A. 1132e, printed in Appendix); that Count 3 (R. 6) charged that petitioner, at the same time and place, possessed the *same* firearm without registering it (26 U.S.C.A. 1132d, printed in Appendix). The Trial Court sentenced petitioner to imprisonment for two terms of five years each for this single possession of the same firearm.

In determining the identity of offenses, the test to which resort is most commonly had is the "same-evidence" test (*Burton v. United States,* 202 U.S. 344, 50 L. Ed. 1057, 1906; *Gavieres v. United States,* 220 U.S. 338, 55 L. Ed. 489, 1911; *Morgan v. Devine,* 237 U. S. 632, 59 L. Ed. 1153, 1915). Since its origination in England in the eighteenth century, this test has been stated in various forms, but the form appearing in *Corpus Juris Secundum, Criminal Law,* section 279, is representative:

> "One test is to ascertain whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, or

> whether *the same evidence would sustain a conviction in each case.* Thus, if the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar; * * *." (Italics supplied).
>
> "Under the test given it is evident that a prosecution under one indictment will bar a prosecution under another for the same offense, notwithstanding a variance in the facts alleged in the two indictments, if it is not essential to a conviction under either indictment to prove the fact on which the variance hinges, * * *."

In order to make an application of the "same-evidence" test to this case, it is necessary to ascertain the elements of the charged offenses. Count 1 (26 U.S.C.A. 1132e) alleged that petitioner received and possessed a firearm upon which the transfer tax had not been paid; Count 3 (26 U.S.C.A. 1132d) alleged that petitioner, at the same time and place, possessed the same firearm without registering it. *Query,* would the evidence which was required to prove Count 1 also have proved Count 3? Stated another way, would the same evidence have sustained a conviction on each Count? If so, both Counts charged the "same offense" within the meaning of the Fifth Amendment to the Federal Constitution.

This Court, in *Rossi v. United States,* 289 U. S. 89, 77 L. Ed. 1051 (1933), has answered these questions in favor of petitioner. There, one count alleged that the

defendants carried on a distilling business without having given the bond required by the statute; another count charged that defendants possessed a still which had not been registered. There was evidence to show that defendants controlled a still, but there was no affirmative evidence of their failure to give the bond or to register the still:

> "The United States claim that in such circumstances the burden of proof to show execution of the bond and registration of the still rested upon the petitioners. * * * And with this view we agree."
>
> "The lower federal courts generally have accepted the doctrine that proof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond which the defendant must overcome by proof."
>
> "The general principle, and we think the correct one, underlying the foregoing decisions is that *it is not incumbent on the prosecution to adduce positive evidence to support a negative averment* the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." (Italics supplied.)

This Court, in enunciating the foregoing doctrine, merely crystallized a rule which had theretofore prevailed in all courts.

Gee Woe v. United States, 250 F. 428 (C. C. A. 5th, *1918*);

Faraone v. United States, 259 F. 507 (C. C. A. 6th, *1919*);
McCurry v. United States, 281 F. 532 (C. C. A. 9th, *1922*);
Goodfriend v. United States, 294 F. 148 (C. C. A. 9th, *1923*);
Montague v. United States, 294 F. 277 (C. C. A. 9th, *1923*);
Giacolone v. United States, 13 F. (2d) 108, (C. C. A. 9th, *1926*);
Taylor v. United States, 19 F. (2d) 813 (C. C. A. 8th, *1927*);
Martinez v. United States, 25 F. (2d) 303 (C. C. A. 5th, *1928*);
Sauvain v. United States, 31 F. (2d) 732 (C. C. A. 8th, *1929*).

Under the National Firearms Act (26 U.S.C.A. 1132-1132q, 1934 Edition), it has been recognized that the requirements of registration, written order and the like are negative averments within the meaning of *Rossi v. United States,* supra (*Crapo v. United States,* 100 F. (2d) 996, C. C. A. 10th, 1939).

In the proceeding now before this Court, the government made out a complete case under Counts 1 and 3 when it proved the receipt and possession of the single firearm. It was not required to prove the negative averments that the transfer tax had not been paid or that there was a failure to register. Therefore, upon the same evidence, petitioner was convicted and sentenced upon each Count.

The Appellate Court, in holding that Counts 1 and 3 described separate offenses, made no reference to the "same-evidence" test nor to *Rossi v. United States,* supra, and thereby failed to apply several pertinent authorities of this Court.

The said holding of the Appellate Court is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Lewis v. United States,* 4 F. (2d) 520 (1925), where defendant was sentenced separately on a count which charged that he possessed certain liquor with intent to sell it without a permit and upon another count which charged that, at the same time, he possessed the same liquor with intent to transport it without a permit. The court held that the imposition of separate sentences was error:

> "Unlawful possession is but one offense. It is necessary to allege intent, whether to sell or to transport, but only to make it appear that the possession is unlawful. * * * There should have been but one sentence for the unlawful possession * * *"

This decision has not been reversed, modified, distinguished, criticized, or expressly overruled. In the case at bar, the offense charged in each count was an unlawful possession; it was only one offense, whether the unlawfulness arose from the failure to pay the tax or the failure to register.

The decision of the Appellate Court is also in conflict with the decision of the Circuit Court of Appeals

for the Eighth Circuit in the case of *Roark v. United States,* 17 F. (2d) 570 (1927), where the statute forbade any person to cause a woman to be transported for purposes of prostitution, debauchery or any other immoral purpose. Count 1 of the indictment charged that defendant caused a woman to be transported for the purpose of having illicit intercourse; count 3, that defendant, at the same time, caused the same woman to be transported for the purpose of prostitution. Defendant was sentenced separately on each count, and the upper court reversed the sentence as to count 3:

> "It is one theory of this indictment that, if a person has but one immoral purpose, he is guilty of one crime, and is guilty of as many more crimes as he may have immoral purposes. We do not think that the act is susceptible of that interpretation. A violation of * * * (the) section is a violation, whether the transportation was for one of the purposes named or all of them. It is the obtaining * * * the transportation for one or more of the immoral purposes which is condemned, and not the having in mind of such immoral purpose or immoral purposes at the time the transportation is obtained * * *."

This decision has not been modified, reversed, distinguished, criticized, or expressly overruled. It has been followed in *Caballero v. Hudspeth,* 114 F. (2d) 545 (C. C. A. 10th, 1940). In the case at bar, a violation of the statute is a violation, whether the possession is illegal for one or all of the reasons named therein. Petitioner submits that it is the unlawful *possession* which is the gravamen of the offense, and

not the particular reason or reasons *because* of which the possession is unlawful.

The decision of the Appellate Court is also in conflict with another decision of the Circuit Court of Appeals of the Tenth Circuit, this time in the case of *Caballero v. Hudspeth,* 114 F. (2d) 545 (1940). There, the statute forbade the transportation of any woman for the purpose of prostitution or any other immoral practice. Defendant was sentenced separately on counts charging, first, the transportation of a woman with intent to compel her to engage in prostitution and, second, at the same time and place, the transportation of the same woman with intent to cohabit unlawfully with her. The court held that the separate sentences imposed double jeopardy:

> "It seems clear that what is prohibited is the transportation in interstate commerce of any female person for any of the interdicted purposes. One transportation constitutes but a single offense, whether the accused had in mind one or more of the prohibited purposes."

This case has not been modified, reversed, distinguished or expressly overruled. The single transportation was illegal for two different reasons, just as petitioner's single possession was illegal for two different reasons, and the court found but one punishable offense.

The decision of the Appellate Court is in conflict with one of its own decisions—that of *Dimenza v. Johnston,* 130 F. (2d) 465 (1942), where the statute provided that whoever, in robbing a bank by force

and violence, should jeopardize the life of any person, should suffer a certain penalty. Defendant had been sentenced separately on three counts of the indictment: count 2 alleged that defendant robbed a bank by force and violence and jeopardized the life of A; count 3, that, in the same robbery, he jeopardized the life of B; count 4, that, in the same robbery, he jeopardized the life of C. The court held that but one offense was charged in the three counts:

> "Petitioner also contends that the second, third, and fourth counts in the indictment, differing only in that each named a different person as the one placed in jeopardy by the same robbery with deadly weapons, were duplications of a single offense of robbing a bank and jeopardizing the life of 'any person' by the use of deadly weapons."
>
> "We conclude that the sentence on count two covered the entire crime described in counts * * * two, three and four * * *."

In the case at bar, the pertinent sections of the statute may be summarized thusly: Whoever, in possessing a firearm, acquires such possession prior to the payment of the transfer tax or fails to register same, shall suffer a certain penalty. In other words, the crime alleged was the *possession* of a firearm *contrary to law*. The singleness of the robbery in *Dimenza* and the singleness of the possession in the instant case demand equal singleness of punishment.

CONCLUSION.

No attempt has been made to set forth all of the authorities in support of the principal question presented in the foregoing petition, namely, that the Appellate Court erred in holding that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 after it had sentenced him upon Count 1. Nor has any argument whatever been advanced upon behalf of the second question presented by the said petition, namely, that the Appellate Court erred in finding (by inference) that petitioner had not served his sentence under Count 1. These are matters strictly pertinent to the merits of petitioner's basic petition for writ of habeas corpus and they have no direct bearing upon the reasons relied upon for the allowance of the requested writ of certiorari.

Petitioner sincerely believes that the arguments made in this brief for the purpose of inducing this Court to grant the said writ of certiorari are sufficient in law and fact; that they demonstrate several sound bases permitting the intervention of this tribunal of last resort, which judicial body can quiet the specified conflicts in the various Circuits and at the same time apply its own decisions in the *Burton, Gavieres, Morgan* and *Rossi* cases.

It is therefore respectfully submitted that this cause is one requiring the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected and that the law may be properly and authoritatively defined; that the decree of the Appellate Court should be reversed, in order that

justice may be done to petitioner; and that, to such an end, a writ of certiorari should be granted and that this Court should review and finally reverse the decree of the said Appellate Court.

Dated, San Francisco, California,
December 20, 1944.

LOUIS S. BEEDY,
Attorney for Petitioner.

JOHN BENNETT KING,
Of Counsel.

(Appendix Follows.)

Appendix

26 USCA 1132b:

"(a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

(b) All provisions of law (including those relating to special taxes, to the assessment, collection, remission, and refund of internal-revenue taxes, to the engraving, issuance, sale, accountability, cancellation, and distribution of tax-paid stamps provided for in the internal-revenue laws, and to penalties) applicable with respect to the taxes imposed by sections 1040 and 1383 of this title, and all other provisions of the internal-revenue laws shall, in so far as not inconsistent with the provisions of sections 1132 to 1132q of this chapter, be applicable with respect to the taxes imposed by sections 1132 to 1132q of this chapter.

(c) Under such rules and regulations as the Commissioner, with the approval of the Secretary, may prescribe, and upon proof of the exportation of any firearm to any foreign country (whether exported as part of another article or not) with respect to which

the transfer tax under this section has been paid by the manufacturer, the Commissioner shall refund to the manufacturer the amount of the tax so paid, or, if the manufacturer waives all claim for the amount to be refunded, the refund shall be made to the exporter."

26 USCA 1132c:

"(a) It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under sections 1132 to 1132q: *Provided,* That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) The Commissioner, with the approval of the Secretary, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue.

(c) Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Commissioner. The original thereof with stamps affixed, shall be returned to the applicant.

(d) No person shall transfer a firearm which has previously been transferred on or after the thirtieth

day after June 26, 1934, unless such person, in addition to complying with subsection (c), transfers therewith the stamp-affixed order provided for in this section for each such prior transfer, in compliance with such regulations as may be prescribed under sections 1132 to 1132q for proof of payment of all taxes on such firearms.

(e) If the transfer of a firearm is exempted from the provisions of sections 1132 to 1132q as provided in section 1132 l, the person transferring such firearm shall notify the Commissioner of the name and address of the applicant, the number or other mark identifying such firearm, and the date of its transfer, and shall file with the Commissioner such documents in proof thereof as the Commissioner may by regulations prescribe.

(f) Importers, manufacturers, and dealers who have registered and paid the tax as provided for in section 1132a (a) shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding such transactions as may be prescribed by regulations under sections 1132 to 1132q."

26 USCA 1132d:

"(a) Within sixty days after the thirtieth day after June 26, 1934, every person possessing a firearm shall register, with the collector of the district in

which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof; *Provided,* That no person shall be required to register under this section with respect to any firearm acquired after the thirtieth day after June 26, 1934, and in conformity with the provisions of sections 1132 to 1132q.

(b) Whenever on trial for a violation of section 1132e the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the thirtieth day after June 26, 1934, but this presumption shall not be conclusive."

26 USCA 1132e:

"It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 1132b or 1132c."

26 USCA 1132m:

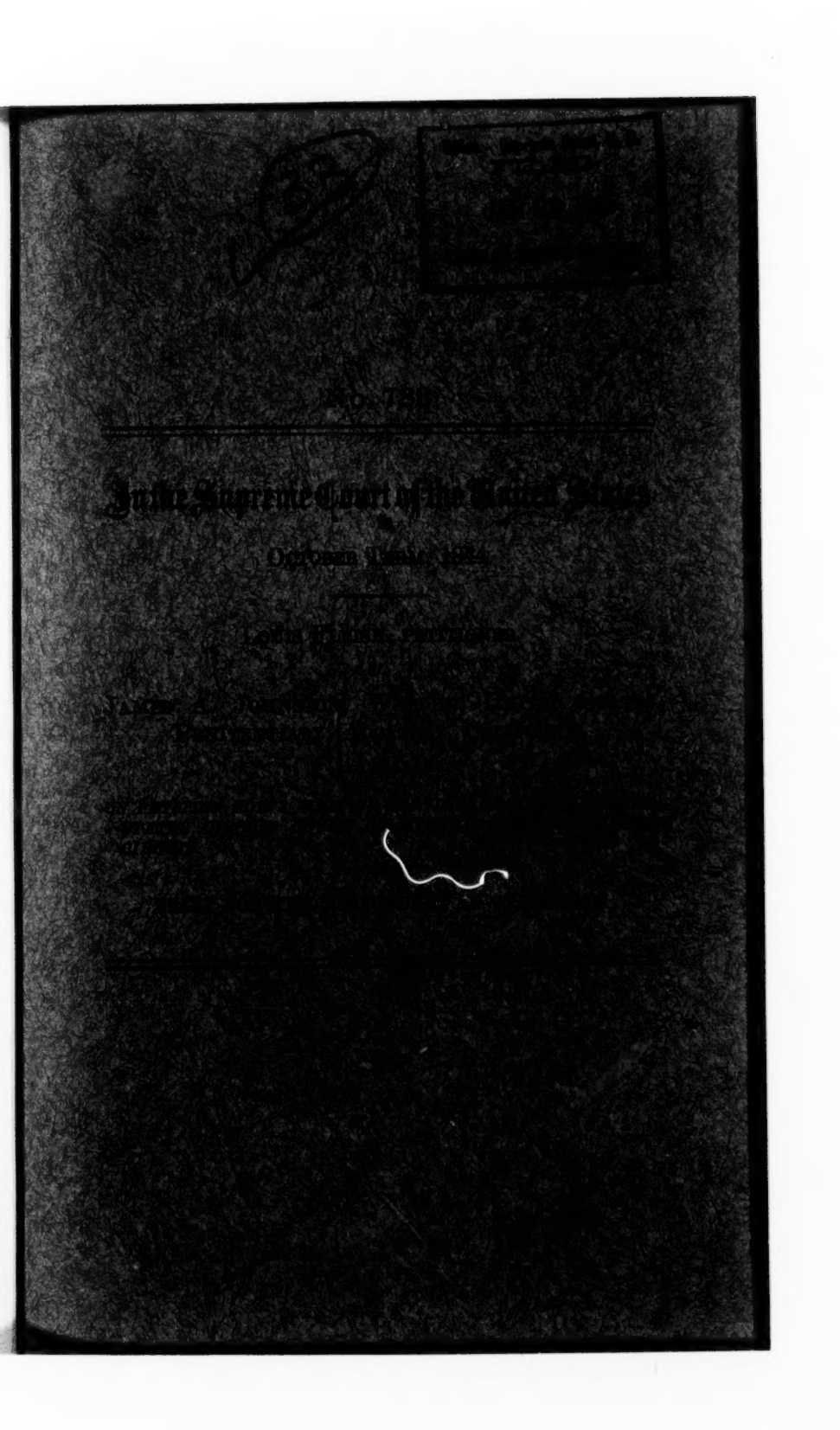
"Any person who violates or fails to comply with any of the requirements of sections 1132 to 1132q shall, upon conviction, be fined not more than $2000 or be imprisoned for not more than five years, or both, in the discretion of the court."

Due service and receipt of a copy of the within is hereby admitted

this.....*day of December, 1944.*

.....

Solicitor General of the United States,
Attorney for Respondent.



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626694—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 783

LOUIS FLEISH, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 13–16) is reported at 145 F. (2d) 16.

JURISDICTION

The judgment of the circuit court of appeals was entered September 29, 1944 (R. 16). The petition for a writ of certiorari was filed December 26, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner is incarcerated pursuant to a judgment imposing consecutive sentences on six counts of an indictment charging violations of the National Firearms Act. Count 1 charged that he received and possessed a firearm which had been transferred in the continental United States and upon which the tax had not been paid. Each of the remaining counts charged that he possessed a different firearm without having registered it with the Collector of Internal Revenue. Petitioner has served his sentence on the first count and the sole question presented is whether he is entitled to be released on habeas corpus on the ground that the remaining sentences are unlawful, because only one offense was charged in the six counts.

STATUTE INVOLVED

The National Firearms Act of June 26, 1934, c. 757, 48 Stat. 1236 ff. (26 U. S. C., 1934 ed., 1132–1132q), provided in pertinent part as follows:[1]

> SEC. 1. (a) The term "firearm" means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun,

[1] This statute was incorporated in the codification of the Internal Revenue Code by the Act of February 10, 1939, 53 Stat. 1 (26 U. S. C. 2720, 2726, 2729, 2732, 2733, 3261 (b)).

and includes a muffler or silencer for any firearm whether or not such firearm is included within the foregoing definition.

* * * * *

SEC. 3. (a) There shall be levied, collected, and paid upon firearms transferred in the continental United States a tax at the rate of $200 for each firearm, such tax to be paid by the transferor, and to be represented by appropriate stamps to be provided by the Commissioner, with the approval of the Secretary; and the stamps herein provided shall be affixed to the order for such firearm, hereinafter provided for. The tax imposed by this section shall be in addition to any import duty imposed on such firearm.

* * * * *

SEC. 5. (a) Within sixty days after the effective date of this Act every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided,* That no person shall be required to register under this section with respect to any firearm acquired after the effective date of, and in conformity with the provisions of, this Act.

(b) Whenever on trial for a violation of section 6 hereof the defendant is shown to have or to have had possession of such firearm at any time after such period of sixty days without having registered as required by this section, such possession shall create a presumption that such firearm came into the possession of the defendant subsequent to the effective date of this Act, but this presumption shall not be conclusive.

SEC. 6. It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of section 3 or 4 of this Act.

* * * * *

SEC. 12. The Commissioner, with the approval of the Secretary, shall prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.

* * * * *

SEC. 14. Any person who violates or fails to comply with any of the requirements of this Act shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court.

STATEMENT

On April 7, 1939, petitioner was convicted in the United States District Court for the Eastern District of Michigan on counts 1, 3, 12, 15, 18 and 21 of an indictment charging violations of the

National Firearms Act (R. 2–3). Count 1 charged that on or about April 27, 1938, petitioner wilfully received and possessed an identified firearm which had been transferred in the continental United States and upon which the firearm tax imposed by Section 3 (a) of the Act had not been paid, in violation of Section 6 of the Act (R. 5). Count 3 charged that petitioner wilfully possessed the same firearm without registering with the Collector of Internal Revenue the number or other mark identifying the firearm, his name and address, his place of business or employment, and the place where the firearm was usually kept, as required by Section 5 (a) of the Act (R. 6). The remaining counts were identical with Count 3, except that each related to a different firearm (R. 6–8).[2] Petitioner was sentenced to consecutive terms of imprisonment for five years on each count and to pay a fine of $2,000 (R. 3).

After he had served the sentence on the first count, petitioner filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California,

[2] Counts 15, 18 and 21 were identical in language and did not specifically identify the particular firearm involved. Petitioner apparently concedes, however, that each of these counts involved a different firearm from that described in counts 1 and 3 (see Pet. 2, 13), and on habeas corpus, since the trial record is not before the court, it must be assumed in support of the judgment that each of these counts related to a different firearm. Cf. *McKee* v. *Johnston*, 109 F. (2d) 273, 275 (C. C. A. 9).

in which he alleged that his continued imprisonment was illegal for the reason that the six counts of the indictment under which he was convicted charged but one offense and that the trial court was therefore without jurisdiction to impose separate sentences on each count (R. 2–3). The respondent filed a return to an order to show cause, and on September 21, 1943, after a hearing, the petition was denied (R. 4, 8). Upon appeal to the Circuit Court of Appeals for the Ninth Circuit the order of the district court was affirmed (R. 16).

ARGUMENT

Petitioner's sole contention (Pet. 13) is that the six counts upon which he was convicted charged but one offense, and that, since he has served the maximum sentence for one offense, respondent is illegally detaining him. His argument runs as follows: First, counts 3, 12, 15, 18, and 21, each of which charged that on or about April 27, 1938, petitioner possessed and failed to register with the Collector of Internal Revenue a different firearm, all involved a simultaneous possession, rather than successive possessions, of the firearms (cf. *Ebeling* v. *Morgan,* 237 U. S. 625). Hence, he was guilty of only one offense under those counts, viz., the illegal possession of unregistered firearms. Accordingly, counts 12, 15, 18, and 21 must be treated as having been merged into count 3 (Pet. 13–17, 18). Second, counts 1

and 3 likewise charged but one offense, for the same evidence would support a conviction under either count. This is true, petitioner asserts, because his failure to pay the tax on the firearm involved in these two counts and to register it are negative averments, which the Government was not required to prove (cf. *Rossi* v. *United States,* 289 U. S. 89; *Crapo* v. *United States,* 100 F. (2d) 996 (C. C. A. 10) (Pet. 18–25)). In our view petitioner's argument is vulnerable in several important respects.

Since petitioner has served only the sentence imposed upon count 1, it is clear that his petition for a writ of habeas corpus is premature if any of the sentences imposed on the remaining counts are valid. *McNally* v. *Hill,* 293 U. S. 131, 138–139; *Holiday* v. *Johnston,* 313 U. S. 342, 349. That petitioner was properly sentenced for more than one offense is hardly open to serious question.

a. Assuming, *arguendo,* that petitioner's argument that counts 1 and 3 involve the same offense, because they relate to the same firearm, is correct, it does not follow that count 1 and either count 12, 15, 18, or 21 state the same offense. Applying the "same evidence" rule for which petitioner contends, it is plain that the evidence necessary to support the conviction under count 1 was not the same as the evidence necessary to support the convictions under these other counts. For in each case proof of possession of a different firearm

was necessary. Petitioner seeks to avoid this conclusion by arguing, without citing any supporting authority, that counts 12, 15, 18, and 21 merged with count 3 (Pet. 18). We submit, however, that petitioner has shown no sound legal basis for invoking a merger theory and that, in fact, his novel argument is without legal support.

b. As we have shown (*supra,* p. 5), counts 3, 12, 15, 18, and 21 were predicated on Section 5 (a) of the Act, which required that "every person possessing a firearm shall register, with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept and place of business or employment." Petitioner's argument in respect of these counts (see *supra,* p. 6), rests on the assumption that the gist of the offense charged in those counts was the possession of the firearms. As we shall show, the assumption is unsound; consequently, his argument is without merit.

Section 5 (a) is plainly directed at securing the registration of every firearm, to the end that with the information thus supplied the remaining portions of the Act may be appropriately enforced. As the circuit court of appeals pointed out (R. 15): "It is evident that the statute requires every firearm to be registered. The registration involves a complete identification of each individual firearm as well as a statement concerning its

present possessor and whereabouts. A record of the latter statement without the identification of the weapon itself obviously would fail to satisfy the terms of the Act. The crime defined by the statute is the failure to register a specific firearm in one's possession, not the failure to indicate generally that one possesses firearms." This view is supported by the legislative history of Section 5 (a) (78 Cong. Rec. 11400) [3] and by the regulations promulgated by the Commissioner of Internal Revenue on August 17, 1934, pursuant to the authority of Section 12 of the Act (26 C. F. R. 307.80).[4] Accordingly, we think it clear, as we argued in our Memorandum in Opposition in *Crapo* v. *Johnston,* No. 567, this Term, certiorari

[3] Congressman Doughton, Chairman of the Ways and Means Committee of the House explained during the discussion of the bill on the floor that it provides that "all those having possession of firearms of the character referred to in this bill, must register the same with the Commissioner of Internal Revenue."

[4] This regulation provided:

> Every person residing in the continental United States in possession of a firearm on July 26, 1934, shall on or before September 24, 1934 (whether or not in his possession on the latter date), register such firearm on Form 1 (Firearms), in duplicate, with the collector for the district in which he resides. The duplicate form, after proper indorsement, will be returned to the registrant by the collector, and the original forwarded to the Commissioner.
>
> A firearm acquired after July 26, 1934, not in conformity with the provisions of the Act, must be registered.

denied, December 4, 1944, that the gist of the offense described by Sections 5 (a) and 14 is the failure to register a firearm, and not mere possession of it. This being true, it follows that in possessing and failing to register five different firearms petitioner committed as to each such firearm the offense made criminal by the Act. Cf. *Ebeling* v. *Morgan,* 237 U. S. 625.

c. In rejecting petitioner's contention that count 1, charging receipt and possession of a firearm upon which the tax had not been paid, and count 3, charging the failure to register the same firearm, constituted but one offense, the court below (R. 14–15) relied on its decision to the contrary in *Crapo* v. *Johnston,* 144 F. (2d) 863, certiorari denied, December 4, 1944. Relying on the "same evidence" test, petitioner now argues (Pet. 19–20), however, that under this Court's decision in *Rossi* v. *United States,* 289 U. S. 89, the only affirmative proof which the Government was required to adduce in support of both counts 1 and 3 was that he received and possessed the firearm, since failure to pay the tax and to register the firearm are negative averments, and that the Government's proof as to each count was therefore the same. Rather than furnishing support for petitioner's position, we submit that the *Rossi* decision firmly supports the Government's view that counts 1 and 3 relate to separate offenses. That case involved a conviction on two counts. One

count charged that the defendant carried on the business of a distiller without having given the bond required by R. S. 3260, and the second charged that he possessed and controlled a still not registered as required by R. S. 3258. The only issue before the Court was whether evidence showing that the defendant had custody and control of a still for the manufacture of alcoholic spirits was sufficient to support the convictions on both counts. In upholding the convictions, the Court held that "it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." (289 U. S. 89, 91–92.) Since the Court upheld the convictions on both counts, it is clear that regardless of what effect may be given to the negative averment doctrine, it does not operate to make what would otherwise be two offenses a single offense. In the *Rossi* case both counts concerned one still, just as counts 1 and 3 here concerned one firearm. Yet, as here, both counts related to a failure to comply with the law in a different respect and the defendant's convictions on both counts were upheld. In this case, the Government was required to prove in support of count 1, at least circumstantially, that petitioner

received and possessed a firearm upon which the tax had not been paid; in respect of count 3 the Government also bore the burden of separately establishing that petitioner wilfully failed to register the firearm with the Collector of Internal Revenue. As in the *Rossi* case, the two counts charged separate offenses and petitioner was thus properly sentenced on both.[5] Cf. *Blockburger* v. *United States,* 284 U. S. 299, 303–304.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below is correct. The case presents no conflict of decisions or important issue of law, and the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

TOM C. CLARK,
Assistant Attorney General.

ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JANUARY 1945.

[5] None of the decisions upon which petitioner relies to establish a conflict (Pet. 5–9, 14–17, 18–24) involve the National Firearms Act and none involve precisely the same question under any other statute. Therefore, there is no basis for his contention that the decision below is in conflict with decisions in other circuits and with decisions of this Court.

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